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No.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

IN THE INTEREST OF
THOMAS ANDREW SCHROUD, A JUVENILE:
BARBARA SCHROUD,

Petitioner,

vs.

MILWAUKEE COUNTY DEPARTMENT
OF PUBLIC WELFARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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MILWAUKEE COUNTY DEPARTMENT
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered on February 1, 1972.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 53 Wis. 2d 650, 193 N.W. 2d 671 and is set out in the appendix, pp. 1-6. The pertinent sections of the trial court opinion and the interim appellate court opinion are set out in the appendix, pp. 6-20.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED FOR REVIEW

1. Have the constitutional rights of the petitioner to due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution been violated because of the refusal to grant petitioner a hearing on a motion, timely filed under state procedure, and allow her an opportunity to present evidence that her consent to terminate her parental rights to her child was obtained by coercion and the result of duress worked upon her by agents of the respondent, Milwaukee County Department of Public Welfare.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Fourteenth Amendment to the United States Constitution.

2. This case involves Sec. 48.46 and Sec. 263.45 Wis. Stats.

STATEMENT OF THE CASE

On July 20, 1969 petitioner, Barbara Schroud, gave birth to Thomas Andrew Schroud at Columbia Hospital in Milwaukee, Wisconsin. At that time Barbara Schroud was unmarried and twenty (20) years of age, having been born on August 26, 1948. Prior to the birth of Thomas, agents of the Milwaukee County Department of Public Welfare had conferred with Barbara Schroud relative to the advisability and procedures involved in terminating her parental rights to the child. Initial contact by the Department of Public Welfare and Miss Schroud was had on

April 16, 1969 and the machinery to accomplish the termination of her parental rights was put in motion prior to the birth of the child. Formal application to the Children's Division of the County Court for Milwaukee County was filed on August 18, 1969. The final hearing to terminate the parental rights of Barbara Schroud to the child, Thomas Andrew Schroud, was held before the Children's Division of the County Court of Milwaukee County on September 23, 1969 at which time Barbara Schroud appeared on her own behalf and consented to the termination of her parental rights. At that hearing she was not represented by counsel nor by guardian ad litem.

On September 18, 1970 Barbara Schroud petitioned the Children's Division of the Milwaukee County Court for a rehearing directed to the termination of her parental rights to Thomas Andrew Schroud alleging in the petition:

A. That the proceedings to terminate her parental rights were initiated and application to the court made during her minority and therefore no guardian ad litem having been appointed pursuant to law to represent her interests, proceedings of termination were null and void and

B. The consent to the termination of parental rights made by Barbara Schroud at the hearing of September 23, 1969 was the result of undue influence exercised by the agents of the Department of Public Welfare for Milwaukee County over the petitioner and that therefore said consent was obtained under duress and it was not voluntary.

Upon the petition filed, the Children's Division of the County Court of Milwaukee County, the Honorable William Bowman presiding, ordered the Milwaukee County Department of Public Welfare to show cause on September 30, 1970 why a rehearing directed to the matters should not be had.

On September 30, 1970 the parties appeared by their respective counsel and after argument and consideration of the record of the hearing of September 23, 1969 the court held:

A. That the petitioner had not been entitled to the appointment of a guardian ad litem and the proceedings were therefore not void for failure to have counsel or guardian ad litem and

B. On the record of the proceedings the consent was voluntary.

Upon these holdings the court denied the petition for rehearing. (App. pp. 12-20).

An appeal was taken from that order denying the petition for rehearing, to the Circuit Court of Milwaukee County, Branch #15, the Honorable Marvin C. Holz, presiding. That court sustained the order of the lower court. (App. pp. 6-12).

On February 1, 1972, the Supreme Court of Wisconsin affirmed the judgment of the Circuit Court of Milwaukee County. (App. pp. 1-6).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT VIOLATES THE FUNDAMENTAL RIGHT OF A LITIGANT TO A HEARING AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is well established that fundamental due process as encompassed in the Fourteenth Amendment requires that a party to litigation be accorded an opportunity to be heard. A clear recitation of the applicable rules is found in the following abstract from Mr. Justice Harlan's majority opinion in *Boddie* v. *Connecticut* (1971) 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend.' Windsor v. McVeigh, 93 US 274, 277, 23 LEd 914, 915 (1876). See Baldwin v. Hale, 1 Wall 223, 17 LEd 531 (1864); Hovey v. Elliott, 167 US 409, 42 L. Ed 215, 17 S.Ct. 841 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' Hovey v. Elliott, supra, at 417, 42 L Ed at 221, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although '(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), 'there can be no doubt that at a minimum they require that depri-

vation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 94 L Ed at 873 . . .

"What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' Armstrong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62, 85 S Ct 1187 (1965) (emphasis added), 'for (a) hearing appropriate to the nature of the case,' Mullane v. Central Hanover Tr. Co., supra, at 313, 94 L Ed at 873. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, 'within the limits of practicability,' id., at 318, 94 L Ed at 875, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."

The applicable principles encompassed in the due process and equal protection clauses of the Fourteenth Amendment have recently been applied in analogous cases deciding the rights of unwed fathers vis a vis unwed mothers and illegitimate children. See *Stanley* v. *Illinois* (decided April 3, 1972), 40 L.W. 4371, and *Rothstein* v. *Lutheran Social Services of Wisconsin* (decided April 17, 1972).

Here, it is of note that the position of the trial court in *Rothstein* was identical to that of the trial court in the case at bar. The opinion of the Wisconsin Supreme Court

in *Rothstein* sub nom *State ex rel Lewis* v. *Lutheran Social Services* (1970), 47 Wis.2d 420, 178 N.W.2d 56, recites:

> "... the court held a hearing on this petition, *but refused to receive any evidence concerning petitioner's fitness* to have custody of the child." (Emphasis supplied) 47 Wis.2d 422-423

In the case at bar, the trial court held a hearing in the petition *but refused to receive any evidence concerning the coercion practiced upon the petitioner.* The key to the constitutional violation rests with the refusal to afford the parties this opportunity to present evidence—the "meaningful opportunity to be heard within the limits of practicability" spoken of in *Boddie* supra.

The Wisconsin Supreme Court declined to respond directly to this critical issue although it appeared to clearly apprehend the problem[1] and the issue was briefed and submitted in constitutional terms.[2] The court does not resolve the issue in constitutional terms, however, but rather decides the merits of the case on the false premise of insufficiency of the pleadings.[3] This despite the fact that no attack on the pleadings had been made by the respondent in the trial court and the decision of the trial court was

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[1] "Right to a hearing on newly discovered evidence.

"Appellant next argues that the trial court should have granted a rehearing in order that she could present evidence of coercion and undue influence which allegedly would show that her consent for the termination of parental rights was not voluntary." App. p. 3.

[2] App. pp. 20-22.

[3] Citing as authority an 1860 decision which involved *NO* claim of constitutional deprivation and *NO* issue of coercion. *Dunbar* v. *Hollinshead* (1860), 10 Wis. 447 (*505).

NOT based *IN ANY WAY* upon pleading insufficiency.[4] Had such an objection been tendered, Wisconsin procedure allowed amendment of the pleading and submission of additional affidavits AS A MATTER OF RIGHT.[5]

The concluding paragraph of the opinion classifies the refusal to afford the petitioner an opportunity to present evidence as a discretionary ruling reversible only when abuse is apparent.[6] It is respectfully submitted that the right to a fair hearing is a subject of constitutional due process and equal protection—not a subject of abuse of discretion.

Finally in the conclusion of its opinion the Wisconsin Supreme Court makes findings of fact as to the voluntariness of the petitioner's consent. This again clearly was not an issue involved in the case at any stage since the trial court had denied the petitioner an opportunity to present *ANY* evidence directed to the issue. The illogic employed is reminiscent of that adopted by the State of Wisconsin in attempting to sustain the constitutional deprivation in *Groppi* v. *Wisconsin* (1971), 400 US 505, 27 LEd 2d 571, 91 S.Ct. 490.[7] As in *Groppi* the position of Wisconsin was that the litigant had not been denied a hearing because he was not entitled to a hearing. Understandably,

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[4] App. pp. 12-20.

[5] See Chapter 263 Wis. Stats., particularly Sec. 263.45.

[6] App. p. 6.

[7] A subsequent case involving *Groppi* also was reversed because of the failure to afford a hearing. See *Groppi* v. *Leslie* (1972), 30 L.Ed. 2d 632, 92 S.Ct. 582.

the argument did not prevail. By such tautalogous reasoning any hearing or opportunity to be heard could be denied in any case. Of course, the facts will support a finding of voluntariness where a petitioner is denied the opportunity to present evidence of coercion of duress. It is fundamental Fourteenth Amendment due process that an essential attribute of a fair hearing is to afford to *both* parties an opportunity to present evidence. Where opportunity is given to only one litigant, any resulting finding of fact is inherently unreliable.

To sanction the decision as announced by the Wisconsin Supreme Court is to effectively deny legal recourse to mothers whose consent to terminate parental rights was obtained by coercion or under duress.

CONCLUSION

For the reasons stated above, certiorari should be granted, and the decision of the Wisconsin Supreme Court reversed per curiam.

Respectfully submitted,

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APPENDIX

APPENDIX

Decision of Wisconsin Supreme Court

APPEAL from an order of the circuit court for Milwaukee county: MARVIN C. HOLZ, Circuit Judge. *Affirmed.*

August 15, 1969, appellant, Barbara Schroud, signed a petition for an order terminating her parental rights to Thomas Andrew Schroud, born to her out of wedlock on July 20, 1969. Appellant was a minor at the time the petition was filed but subsequently reached her majority on August 26, 1969. On September 23, 1969, following an adjournment on September 12th, at appellant's request, a hearing was held on the petition. After appellant was thoroughly questioned with regard to her understanding of the proceedings and had executed a written consent, the court entered an order for the termination of her parental rights. September 18, 1970, appellant petitioned the county court for a rehearing on the grounds of newly discovered evidence. Appellant alleged that the statutory procedure was not followed in that a guardian *ad litem* had not been appointed for her and that her consent was the result of undue influence and coercion. The motion was denied following a hearing on September 30, 1970. An appeal was taken to the circuit court, and on December 17, 1970, by written decision, the circuit court affirmed the order of the county court.

For the appellant there was a brief by *Samson, Friebert, Sutton & Finerty* and *Robert E. Sutton*, all of Milwaukee, and oral argument by *Robert E. Sutton.*

For the respondent there was a brief by *E. Michael McCann,* district attorney of Milwaukee county, and *Kenneth J. Bukowski,* assistant district attorney, and oral argument by *Mr. Bukowski.*

CONNOR T. HANSEN, J. On appeal from the order of the circuit court, it is contended: (1) That the proceedings were void for the failure to appoint a guardian *ad litem* for the appellant; and (2) that the appellant is entitled to a hearing in order to present newly discovered evidence on a challenge of the voluntariness of her consent.

Failure to appoint a guardian ad litem.

Appellant contends that the appointment of a guardian *ad litem* was a prerequisite to the institution of proceedings for the termination of her parental rights. Because the instant proceedings were instituted by a petition signed by appellant when she was a minor and without a guardian *ad litem,* it is argued that the proceedings are void.

A threshold issue is whether this question may properly be considered. Under sec. 48.47, Stats., appeals must be taken within forty days of the entry of the order. This time period has elapsed. Furthermore, the failure to appoint a guardian *ad litem* cannot be said to constitute newly discovered evidence under sec. 48.46. Sec. 48.42 (2) directs the court to appoint a guardian *ad litem* for any minor or incompetent parent in proceedings to terminate the parental rights of such person. It further declares that no parental rights of a minor or incompetent may be terminated by consent, pursuant to sec. 48.40 (1), unless the guardian *ad litem* joins in the written consent of the parent. In order to declare the order of the county

court void, it would be necessary to hold that the termination of parental rights under sec. 48.42 is prohibited unless the appointment of a guardian *ad litem* is made at the institution of the proceedings. Thus, the threshold issue is inseparable from a consideration of the question on the merits.

Although sec. 48.42, Stats., does not declare at what stage in the proceedings a guardian *ad litem* must be appointed, sec. 48.02 provides that a guardian *ad litem* shall be appointed in the same manner as in county court. Under sec. 324.29 (2) (sec. 879.23, effective April 1, 1971), the appointment may be made at any time prior to the hearing. Thus, as the circuit court correctly held, "[i]t is the consent which is the critical act and which needs the joinder of a guardian *ad litem* if the parent is a minor." Since appellant was not a minor at the time of the hearing and at the time she executed the written consent, it was unnecessary for a guardian *ad litem* to have been appointed. The filing of the petition did not prejudice the rights of the appellant and she could have withdrawn her petition at any time or chosen not to have signed the consent form on the date of the hearing.

Right to a hearing on newly discovered evidence.

Appellant next argues that the trial court should have granted a rehearing in order that she could present evidence of coercion and undue influence which allegedly would show that her consent for the termination of parental rights was not voluntary.

The granting of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. *Bear* v. *Kenosha County* (1963), 22 Wis. 2d 92, 125 N. W. 2d 375. The statutory authorization for

such relief is found in sec. 270.50, Stats. However, the present situation is controlled by sec. 48.46, which provides:

> "New evidence. A parent, guardian, legal custodian or next friend of any child whose status has been adjudicated by the juvenile court may at any time within one year of the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. Upon a showing that such evidence does exist, the court shall order a new hearing and make such disposition of the case as the facts and the best interests of the child warrant."

Under the above statute, two requirements must be met: (1) There must be shown the existence of newly discovered evidence, and (2) the evidence must be of such a character as to affect the advisability of the original adjudication. Appellant has failed in both respects.

In *Dunlavy* v. *Dairyland Mut. Ins. Co.* (1963), 21 Wis. 2d 105, 115, 124 N. W. 2d 73, the court quoted with approval a statement from *Dunbar* v. *Hollinshead* (1860), 10 Wis. 447 (*505), with regard to the type of evidence which must be shown:

> " 'The affidavit of newly discovered evidence is clearly insufficient. The party seeking a new trial on this ground must give the court the best evidence possible of the truth of the allegations. In order to do this he must produce the affidavits of the witnesses themselves, or satisfactorily show why he cannot do so. In this case no reason or excuse whatever for their non-production is offered. The strict observance of this rule is indispensable, in order to guard against unfounded applications.' "

Appellant's evidence consisted of a statement by her attorney of the type of proof which would be offered and her own affidavit stating that her consent was obtained under duress and by coercion. Clearly, appellant has not complied with this requirement.

The decision of the circuit court contains the following findings:

> "A review of the record indicates that at the time of the hearing the petitioner was a junior in college, that the alleged father was from Jamaica where he intended to return after completing his education and there were no present plans of the petitioner and the father to marry. It further appears that the original hearing was adjourned 11 days because of a request of the petitioner. This was in conformity with the trial court's announced policy of encouraging adjournments so that mothers under these circumstances could arrive at intelligent and voluntary decisions without coercion.
>
> "At the termination proceedings critical questions bearing upon the issues were framed by the court to elicit answers from the petitioner which would require her own explanation for her reasons. Leading questions were not used. The record demonstrates that the procedure was carefully conducted to determine whether the consent was voluntary and made with full knowledge of its consequences. The trial court was persuaded that the consent given by the petitioner was not a quick decision and that it was made intelligently. A reading of the record supports that conclusion."

We can add little to these findings of the circuit court. Our review of the record also brings us to the conclusion the actions of the appellant at the termination proceedings, including the execution of the consent, were intelligent and voluntary decisions without coercion and made with full knowledge of their consequences.

We conclude that the Milwaukee County Court--Children's Division did not abuse its discretion in refusing to reopen the case or permit further evidence to be offered for the purpose of vacating the termination order entered nearly one year before the instant proceedings were commenced.

By the Court.—Order affirmed.

Pertinent part of decision of lower court.

MEMORANDUM DECISION APPEALED FROM

This is an appeal from an order of the County Court-Children's Division dismissing a motion seeking a rehearing pursuant to section 48.46 Stats. on the ground that new evidence has been discovered affecting the advisability of the Court's original adjudication or disposition. The order which petitioner seeks to set aside is an order terminating the petitioner's parental rights to a child born out of wedlock to her.

It is contended that the order terminating her parental rights was voidable for the reason that the petitioner was a minor when the proceedings were commenced and no guardian ad litem was appointed for her and because her consent was obtained by coercion.

Petitioner was born on August 26, 1948. On July 20, 1969 she gave birth to a child out of wedlock. On August 15, 1969 the petitioner signed a petition for order terminating her parental rights. At that time she was 20 years of age. No guardian ad litem was appointed for her. When the matter came on for hearing on September 12 she had reached her majority. The hearing was adjourned upon the petitioner's request for more time. No testimony

was taken at the original hearing. On the adjourned date, September 23, 1969, she was interrogated by the Court, executed a written consent and her rights were terminated.

Section 48.46 provides that a parent of any child whose status has been adjudicated by the juvenile court may at any time within one year of the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. On a showing that such evidence does exist the Court shall order a new hearing and make such disposition of the case as the facts and best interests of the child warrant. It would appear that this section was primarily intended to apply to adjudications of delinquency but it is broad enough to cover this situation at bar . . .

In support of his position that undue influence and coercion was exercised upon the petitioner making her consent involuntary, counsel stated to the trial court that they would offer proof of what transpired between the petitioner and representatives of the Department of Public Welfare leading up to the hearing, expert psychiatric testimony describing the petitioner and the general condition of women who have recently given birth to children relative to their volitional capacities and evidence of the petitioner's attempt to rescind in a reasonable time before the child was placed for adoption. At that point the trial court reviewed the file and transcript and determined that the petitioner's consent had been given voluntarily. Because the child had been placed for adoption and had been finally adopted by its adoptive parents, the trial court stated that "wounds which would be opened and struck by testimony taken over one year after the event would be unconscionable." The Court also found that irregularity in

the record had been demonstrated and that there was no showing of sufficient grounds which would be sufficient to overcome the record made in the case.

Motions for new trial on the grounds of newly discovered evidence are addressed to the sound discretion of the trial court. *Dugenske* v. *Wyse* (1927), 194 Wis. 159; *Birdsall* v. *Fraenzel* (1913), 154 Wis. 48. The real issue before the Court is whether the trial court abused its discretion by not adjourning the hearing to give the petitioner an opportunity to present the evidence which counsel indicated he would produce.

The precise procedure or mechanics for obtaining relief under section 48.46 is not prescribed by the statute. It is clear that rehearings conducted pursuant to section 48.46 are limited to those based upon the discovery of new evidence. The Court has the power only to hear the original case upon the evidence which was not produced at the trial and which bears upon the original adjudication. It does not have jurisdiction to consider evidence bearing upon the present advisability of the order. *In re Willard* (1937), 225 Wis. 538, 558. Although the mechanics or procedures are not prescribed by section 48.46 a motion for a new trial or for relief from a judgment must be supported by affidavits detailing the nature of the evidence sought to be adduced. *Dunlavy* v. *Dairyland Mut. Ins. Co.* (1963) 21 Wis. (2d) 105. Illustrative of the type of showing required in a motion for a new trial on the grounds of newly discovered evidence is *Dunbar* v. *Hollinshead* (1860), 10 Wis. 447 (*505). It was there said:

> "The affidavit of newly discovered evidence is clearly insufficient. The party seeking a new trial on this ground must give the court the best evidence possible of the truth of the allegations. In order to do this

> he must produce the affidavits of the witnesses themselves, or satisfactorily show why he cannot do so. In this case no reason or excuse whatever for their non-production is offered. The strict observance of this rule is indispensable, in order to guard against unfounded applications."

The affidavit must give the name of the witnesses and set forth the facts he will swear to on the trial. *Blood* v. *Whitman* (1850), 3 Pinney 54. Not only must the affidavits set forth the newly discovered evidence with considerable particularity a new trial should not be granted because of newly discovered evidence unless there is substantial ground for believing that such evidence may probably change the result. *Birdsall* v. *Fraenzel* (1913), 154 Wis. 48; *Estate of Teasdale* (1952), 264 Wis. 1; *Kremer* v. *Sponholz* (1906), 129 Wis. 549.

An examination of the affidavit of the petitioner filed in support of her motion for rehearing simply states that the consent "was obtained under duress and by coercion" and "was not freely and voluntarily" given. She also states that at the present time she is financially and psychologically able to furnish a home and provide and care for her son. The facts alleged concerning coercion are not evidentiary but are conclusionary. The statements that she is presently financially and psychologically able to furnish a home and provide and care for her son if true could not be considered by the Court under the rule of the Willard case.

During argument counsel for the petitioner enlarged upon the nature of the type of proof to be offered. Statements of counsel are not sufficient. Counsel stated that the petitioner would describe what transpired between the petitioner and the representatives of the Department leading up to the hearing, that expert psychiatric testimony

would be offered describing the petitioner and the general condition of women who have recently given birth to a child relative to the volitional capacities and evidence of petitioner's attempt to rescind in reasonable time before the child had been placed.

This does not tell the Court what the facts are so that it has an opportunity to determine the possibility that such testimony would change the result of the previous order. Under established rules and decisions of the Supreme Court of Wisconsin it was incumbent upon the petitioner to offer evidentiary facts which she proposed to prove. A bare assertion that she attempted to rescind her consent within a reasonable time before the child had been placed for adoption is insufficient.

Against this minimal showing on the part of the petitioner the record made in the termination proceedings and the public policy factors involved brought the trial court to a conclusion that the proceedings should go no further.

A review of the record indicates that at the time of the hearing the petitioner was a junior in college, that the alleged father was from Jamaica where he intended to return after completing his education and there were no present plans of the petitioner and the father to marry. It further appears that the original hearing was adjourned 11 days because of a request of the petitioner. This was in conformity with the trial court's announced policy of encouraging adjournments so that mothers under these circumstances could arrive at intelligent and voluntary decisions without coercion.

At the termination proceedings critical questions bearing upon the issues were framed by the Court to elicit answers from the petitioner which would require her own ex-

planation for her reasons. Leading questions were not used. The record demonstrates that the procedure was carefully conducted to determine whether the consent was voluntary and made with full knowledge of its consequences. The trial court was persuaded that the consent given by the petitioner was not a quick decision and that it was made intelligently. A reading of the record supports that conclusion.

The trial court was also mindful that under any circumstances the petitioner would have to establish facts justifying a reversal of the original order by clear, strong and satisfactory proof. *Harris* v. *Gollonar* (1940), 235 Wis. 572. Counsel for the petitioner stated to the trial court in his argument that he was aware of such burden.

Finally the trial court considered the possible consequences of reopening the matter.

The subsequent intervention of the rights of innocent third parties is an important consideration. The legislature has indicated a strong policy against upsetting adoptions for obvious reasons. The revocation of the consent of natural parents should be discouraged once an order of adoption is rendered. It should be noted that section 48.90 Stats. provides that no petitions for adoption shall be made until the child has lived six months in the home of the petitioner. The time for a petition for adoption is not related to the provision which permits a rehearing within one year. Hence conflict can occur. Perhaps this is because section 48.46 was primarily intended to permit rehearings in the case of delinquency adjudications. In any event the time provision set in section 48.90 should be preferred over those of section 48.46.

Under all of the circumstances the Court is satisfied that the trial court did not abuse its discretion in declining to reopen the matter or permit further evidence to be offered for the purpose of vacating the consent. For this reason the Court sustains the order dismissing the petition for a rehearing.

Dated at Milwaukee, Wisconsin, this 17th day of December, 1970.

By The Court:
/s/ Marvin C. Holz
Marvin C. Holz, Circuit Judge

Decision of trial court.

DECISION OF COUNTY COURT

The Court: Section 48.42 of the Wisconsin Statutes provides as follows: Procedure in terminating parental rights. The termination of parental rights under section 48.40 shall be made only after a hearing before the court. The court shall have notice of the time, place and purpose of the hearing served on the parents personally at least 10 days prior to the date of the hearing; or if the court is satisfied that personal service, either within or outside the state, cannot be effected, then such notice may be given by registered mail sent at least 20 days before the date of the hearing to the last known address of the parent, if an address is known, and by publication thereof in a newspaper in the county once a week for 3 weeks prior to the date of hearing. A parent who consents to the termination of his parental rights under section 48.40 (1) may waive in writing the notice required by this section.

This apparently has been complied with insofar as the waiving and consent by signature of the parent is concerned, as appears in this record by reference to the Clerk's minutes and documents. There is argument here that although this mother, Barbara Schroud, was not a minor at the time of the hearing the section with respect to minor's rights should have been invoked by this Court * * * The law does not so provide. If a minor is involved at the time of the hearing, the following would be required: If the parent is a minor, his waiver shall be effective only if his guardian ad litem concurs in writing.

In the case of any minor or incompetent parent, the Court shall appoint a guardian ad litem. No parental rights may be terminated on consent under Section 48.40(1) unless the guardian ad litem, in writing, joins in the written consent of the parent to the termination of his parental rights.

The record in this case, which the Court will refer to, will determine the age status of Barbara Schroud. Now, insofar as disposition is concerned, 48.43 provides that if after a hearing the Court finds that one or more of the conditions set out in Section 48.40 exist, it may terminate parental rights. If the Court terminates parental rights, of both parents, of the mother, if the child is illegitimate, or of the only living parent, the court shall—and the word is "shall"—transfer guardianship and legal custody of the minor to: (a) A county department of public welfare in counties having a population of 500,000 or more. Insofar as Milwaukee County is concerned, this does apply. There is also a provision that it may be transferred to a child welfare agency licensed to accept guardianshp of children, or the Department. That is the State Department of Health and Social Services. Or, (d) A suitable individual in whose home the minor has resided at least one year prior to the termination of parental rights.

The record will show the type of disposition which was made on the date in question when the order for termination of parental rights was made. A certified copy of the order terminating parental rights, a certified copy of the birth certificate of the mother, and a transcript of the testimony in the termination of parental rights hearing shall be furnished by the court to the person given guardianship of the minor; except as otherwise determined by the court, any guardian appointed under the provisions of this chapter shall file with the court a report in writing on the status of the child at the end of six months following the date of the order appointing such guardian and on each anniversary date of such order. A copy of each such report so filed shall be available to the county court in which the petition for the adoption of the child is filed at the time of the filing of the petition. All of this must be complied with in the proceedings post-termination of parental rights.

There is a provision for rehearing and appeal under the provisions of Section 48.46; on ground of new evidence a parent, guardian, legal custodian or next friend of any child who status had been adjudicated by the juvenile court may at any time within one year of the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. Upon a showing that such evidence does exist, the court shall order a new hearing and make such disposition of the case as the facts and the best interests of the child warrant.

There are also proceedings for appeal for aggrievement on the record of the case made and disposition of the court made.

These sections, then, are pertinent in the determination of the issue whether this Court should, based upon the statement of counsel and the showing of counsel, re-open this matter for further proceedings.

The Court now will make reference to the record which was established in case number 80773 in the interests of Thomas Andrew Schroud, proceedings for termination of parental rights. Have counsel access to a copy of this transcript?

Mr. Sutton: Yes, your Honor.

The Court: So that you may follow it. This was presided over by myself on the 23rd day of September, 1969, in the morning, A.M. The Court announced the case. Jurisdiction had been obtained, by prior statement of the Clerk, by waiver and consent of the mother. Her signature appears thereupon.

The case was in Court on September 12 and the mother requested more time. The issue, then, is: was this a case in which there had not been reflection? The very statement which is in this record would indicate that the mother deliberated for a considerable period of time prior to September 23, nineteen hundred and sixty-nine.

On the 23rd, on the return date after adjournment, the following appearances were made: Miss Barbara Schroud, and Mrs. Joan Pascoe. Both sworn. Miss Schroud, on page one, testifies as to her address. She states that she has not—never been married. The age is twenty-one, date of birth August 26, nineteen hundred and forty-eight. Reference is made, in this record, to the date of the birth of the baby boy, which she says she gave birth to on July 20, 1969. The name of the child, Thomas Andrew Schroud, born in Columbia Hospital and thereafter placed in the care of Milwaukee County Department of Public Welfare.

Reference is made to application made to this court for the ending of parental rights. Answer is in the affirmative, that she so did, and that she read it and understood it when she signed it. There is also reference relative to a consent—the bottom of page two—as to the status of the record and the voluntariness of the application. The reasons for giving up the son are given: because it is in mine and the baby's best interests at this time. The Court pursued for a more specific reason, and the mother answered: well, I think that the baby needs a father, and I'm not able to provide the security and a home that he needs right now.

The question was then asked by the Court whether she planned to marry the father of this child, and the answer came back: not right now. The Court advised her further that she could force the father to support the child and indicated that settlement in cases of this type was in the amount of $4,000. She indicated that she didn't realize that. The Court indicated that it has communicated this as information to her; and she said—she indicated, now, that she understood this.

She indicated she talked to her parents about the decision and that the parents were in agreement with her. She indicated that she had talked with her case-worker; that her caseworker had explained the nature of these proceedings to her, and that she was sure that she understood these proceedings. She indicated also, in instructions of the Court, she would never know where Thomas was or with whom he was placed. She understood this. She understood that the decision she was making was final, under instructions of the Court. She also realized, she indicated, that she would never be able to change her mind about it; that Thomas would never inherit from her and she would never inherit from him.

At the termination of this series of instructions the Court asked her this question: Do you have any questions at this time? And she answered: No, I don't. The Court still proceeded to finalize and give her an opportunity to change her mind by asking this question: You're still willing to proceed with this today? And the answer came back from Barbara: Yes.

She indicated that she had no religious preference, and with respect to the question of whether she desired him to be brought up in a Christian family, answered: Not particularly.

Mrs. Pascoe was then called as a witness. Mrs. Pascoe, a caseworker for Milwaukee County Department of Public Welfare, indicating that she had cared for Barbara and Thomas Schroud; that this child was now in the care of her agency and was in Wisconsin and adoptable and in good health. With respect to advising Barbara of the nature of these proceedings, she answered that she had. With respect to Barbara's understanding, she answered that she did understand. With respect to free and intelligent consent, in response to the request of the Court, Mrs. Pascoe indicated that she had consented freely and intelligently; that she knew of no reason why the petition should not be granted, and believed that it would be in the best interests of Thomas if the rights of the mother were terminated, indicating an agreement for the agency to consent to the guardianship and custody of the child, and authorized her to consent on their behalf.

The comments of this Court, although the Court does not recall the extent to which it commented, I think are very, very pertinent here. The Court addressed Barbara at that point as follows: Barbara, you're in court. I'm satis-

fied—after making a very thorough, understanding, and intelligent decision this morning, the Court is satisfied that you have given fair and very serious consideration to your decision.

The Court indicated that it desired to compliment her on the thoroughness with which she had arrived at her decision, and thereafter indicated that under the circumstances described in the record the Court believed that it would be in the best interests of Thomas if the rights of his mother were terminated. The Court then ordered the termination of the rights of the mother and transferred legal custody and guardianship of the child to the Milwaukee County Department of Public Welfare, so ordering it.

These are very, very serious matters, and this Court has been very solicitous of the wishes of mothers in similar circumstances as Barbara's. In the event that they indicate the slightest doubt, that they are unable to make an intelligent decision, the Court will not proceed. In fact, encourages adjournments so that there may be time for the mothers, under these circumstances, to arrive at an intelligent and voluntary decision without any coercion whatsoever. It appears from this record that in the case of Barbara there was some indecision prior to the first time she was in court on September 12; that she was in court on September 12 with Mrs. Pascoe. There was no testimony taken which is of record at that hearing, but there is an indication in the minutes of the Clerk that there was a request for more time, which was granted by this Court. There was no hurry for a quick decision. In fact, the opposite is indicated in this record.

Thereafter Barbara appeared back into the court on the 23rd day of September, nineteen hundred and sixty-nine, and voluntarily, as the record shows, gave up her child, fully advised in the premises by the Court. In fact, the decision was actually in the final statements of the Court complimented by the Court.

The circumstances here are aggravated by the fact—this is stated by the District Attorney in his argument to this Court—that once the order was made thereafter there was a proceeding, regular, in the county court, in which this child was thereafter adopted, actually, by adoptive parents, and they are now legal parents of this child.

This is what the Court tries to avoid, that a parent would come into this Court voluntarily terminate her rights to her child, but because of some indecision, not understanding that her act was final as of the time that she did it and that she could never again change her mind. The reason for it is very, very clear. In the statutes of this state, and also human understanding, a parent who adopts a child receives all the rights of inheritance, all rights of descent, and stands as the legal father and mother of the adoptive child. When this act is performed by a court under regular court proceedings, no one can alienate the child from an adoptive parent. No one in this world.

This has been done in this case. This Court believes that wounds which would be opened and struck open by testimony taken over a year after the event would be unconscionable. There is no irregularity shown in this record. There is no showing of sufficient grounds by argument of counsel which in the opinion of this Court would be sufficient to overcome the record which was made by Barbara

Schroud on oath in this court on September 23, nineteen hundred and sixty-nine. She indicated in her testimony she understood her act was final and that she would never be able to change her mind about it in the future.

For this reason this Court must respectfully deny able counsel's request for a rehearing. It is so ordered. That is all.

Pertinent abstract of brief of petitioner in Wisconsin Supreme Court.

II. UPON A CLAIM OF UNDUE INFLUENCE OR COERCION RENDERING THE CONSENT OF A MOTHER TO TERMINATION OF HER PARENTAL RIGHTS INVOLUNTARY, PETITIONER IS ENTITLED TO A HEARING WHEREAT EVIDENCE MAY BE INTRODUCED TO SUPPORT THE CLAIM.

In the petition Barbara Schroud claimed that her consent to terminate her parental rights was obtained by undue influence and coercion by agents of the Department of Public Welfare for Milwaukee County and that under all the attendant circumstances the consent was involuntary. At the proceedings on the order to show cause, counsel for Miss Schroud argued that matters of coercion and duress could not be resolved from the record and requested a hearing so that factual determination could be made by the court. The burden of proof by the clear proponderance of evidence clearly would rest with the petitioner. The court was advised that at such a hearing the petitioner was prepared to present testimony not only from the petitioner but expert psychiatric testimony directed specifically "to Miss Schroud and the circumstances involving the termination of her parental rights." (A. Ap. p. 119, R. 32-33) The court found from the record of the proceedings

conducted on September 23, 1969 that the act of Barbara Schroud in consenting to the termination of parental rights was final and denied the request for a hearing. (A. App. pp. 115-116, R. 45-46)

It is elementary that for any act of consent to be lawful it must be voluntary. Coercion abrogates consent of any kind. The law does not recognize non-volitional conduct. *People* v. *Catholic Home Bureau* (Ill. 1966) 213 NE 2d 507.

Although no Wisconsin case has considered the proposition, other jurisdictions have concluded that a parent may challenge consensual termination of parental rights on the grounds that the consent was obtained by coercion or under duress and was involuntary. *A & B* v. *C & D* (Ark. 1965) 390 SW 2d 116, *Keeling* v. *Minton* (Ken. 1960) 339 SW 2d 464, *French* v. *French* (Mo. 1963) 373 SW 2d 635, *Riley* v. *Byrns* (Mont. 1965) 399 P 2d 980, *In Re Adoption of Arnold* (Fla. 1966) 184 So. 2d 192. No authority to the contrary is extant.

Admittedly in such circumstances the burden is upon the claimant to prove the assertions, however, it is obvious that this burden cannot be met unless petitioner is afforded the opportunity to present evidence. The lower court by its decision in the case at bar denied to the petitioner this opportunity.

Absent an evidentiary hearing whereat petitioner may present the evidence of coercion and undue influence no resolution of that claim can properly be had.

The 14th Amendment to the Constitution of the United States provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellant respectfully submits that to deprive a mother of the custody of her natural child by duress and/or undue influence is to violate fundamental rights guaranteed under the 14th Amendment.

CONCLUSION

The proceedings terminating the parental rights of Barbara Schroud are void for want of appointment of a guardian ad litem, and the custody of Thomas Andrew Schroud should therefore be ordered returned to petitioner.

In the event this court should determine that the proceedings are not void for the above reason then it is submitted that the proceedings should be remanded for a hearing directed to voluntariness of the consent so that findings of fact may be made regarding the claim of undue influence and coercion.

Respectfully submitted,

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Attorney for Appellant

COPY

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1382

IN THE INTEREST OF
THOMAS ANDREW SCHROUD, A JUVENILE:
BARBARA SCHROUD,
Petitioner,

vs.

MILWAUKEE COUNTY DEPARTMENT
OF PUBLIC WELFARE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1382

IN THE INTEREST OF
THOMAS ANDREW SCHROUD, A JUVENILE:
BARBARA SCHROUD,
Petitioner,

vs.

MILWAUKEE COUNTY DEPARTMENT
OF PUBLIC WELFARE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 53 Wis. 2d 650, 193 N.W. 2d 671. That opinion, pertinent sections of the trial court opinion and the interim appellate court opinion are set out in the appendix of Petition, pp. 1-20.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on February 1, 1972. It affirmed the judgment of the Circuit Court of Milwaukee County on December 17, 1971, sustaining the Milwaukee County Court's (Children's Division) order of September 30, 1971, which dismissed the petition for rehearing.

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED FOR REVIEW

Have the constitutional rights of the petitioner to due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution been violated because of the refusal of the state courts to grant petitioner a rehearing on the question of the voluntariness of her consent to the termination of her parental rights to her subsequently adopted child after that question was decided by the trial court at the initial hearing and reviewed at the hearing on rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Fourteenth Amendment to the United States Constitution.

2. This case involves Wisconsin Statutes sections 48.01, 48.46, 48.86 and 263.45.

STATEMENT OF THE CASE

On July 20, 1969, petitioner gave birth to a child out of wedlock. (App. 1, 6, 15 of Petition).

On August 15, 1969, the petitioner signed a petition for order terminating her parental rights to that child. (App. 1, 6 of Petition).

On September 12, 1969, petitioner and a representative of the Milwaukee County Department of Public Welfare appeared before the Honorable George A. Bowman, Jr., Milwaukee County Court Children's Division. Upon the petitioner's request for more time, the court adjourned the matter to September 23, 1969. (App. 1, 5, 6, 7, 10, 15, 18, 19 of Petition).

On the adjourned date, after being accorded eleven days to reconsider and reflect upon her tentative decision to terminate her parental rights, the petitioner appeared before the same trial court. Present again was the same representative of the Milwaukee County Department of Public Welfare, Mrs. Joan Pascoe. Both Miss Schroud and Mrs. Pascoe were placed under oath by the court. Miss Schroud testified at the September 23, 1969, hearing before Judge Bowman that she was 21 years of age, that she had given

birth to Thomas Andrew Schroud at Columbia Hospital in Milwaukee, Wisconsin, and that after the birth of the child he was placed in the care of the Milwaukee County Department of Public Welfare. She further testified that she read and understood the *application* for termination of parental rights which she had signed. (App. 1, 15, 16 of Petition).

When asked by the trial court why she was asking to terminate her parental rights, she stated: "Because it is in mine and the baby's best interest at this time." She further elaborated that she believed the baby needed a father and that she was not able, at the time, to provide the security and the home the child needed. She stated she did not plan to marry the father of the child "right now." (App. 10, 11, 16 of Petition).

Significantly, the court then asked the petitioner, a junior in college (App. 5, 10 of Petition), if she had talked with her parents about her decision. She stated that she had and that they had agreed with her decision. She further stated she had talked with her caseworker, Mrs. Pascoe, and that Mrs. Pascoe had explained to her the nature of the termination proceedings. Petitioner stated she understood the nature of the proceedings. (App. 16, 17 of Petition).

The court then inquired of petitioner whether she understood that she would never know where her son was or with whom he was placed if the court granted the petition for termination, and petitioner stated she understood that. (App. 16 of Petition).

The court further asked whether she understood that the decision she was making was final, and she answered in the affirmative, indicating she understood she would never be able to change her mind about the decision once it was made.

She stated she had no questions and that she was willing to proceed with the termination immediately, indicating no religious preference for her son, stating she did not particularly wish him to be brought up in a Christian family. (App. 16, 17, 20 of Petition).

Mrs. Pascoe, under oath, identified herself as a caseworker for the Milwaukee County Department of Public Welfare, stating she had been caring for petitioner and her son, stating that the child was then in the care of the Milwaukee County Department of Public Welfare. She further testified that the child was adoptable and that she had advised the petitioner the nature of the termination proceedings and that she was sure she understood them. The court then, significantly, asked the caseworker: "Do you believe that her consent this morning has been freely and intelligently given?" Mrs. Pascoe stated, "Yes, I do." She further stated she knew of no reason why the petition for termination should not be granted and that her agency was willing to accept the custody and guardianship of the child. (App. 17 of Petition).

The court then concluded: "Barbara, you're in court. I am satisfied, after making a very thorough, understanding, and intelligent decision this morning, the court is satisfied that you have given fair and very serious consideration to your decision." (App. 17, 18 of Petition). The court then entered an order terminating the rights of the mother and transferring legal custody and guardianship of the child to the Milwaukee County Department of Public Welfare. (App. 1, 7, 18 of Petition).

On September 18, 1970, five days less than a full year later, the petitioner petitioned for a rehearing pursuant to the provisions of Wisconsin Statutes sec. 48.46. Wisconsin Statutes sec. 48.46 reads as follows:

> New Evidence. A parent, guardian, legal custodian or next friend of any child whose status has been adjudicated by the juvenile court may at any time within one year of

the entering of the court's order petition the court for a rehearing on the ground that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. Upon a showing that such evidence does exist, the court shall order a new hearing and make such disposition of the case as the facts and the best interests of the child warrant. (App. 1, 4, 7, 8, 14 of Petition).

In the unverified petition for rehearing, through counsel, the petitioner *concluded* that "new evidence has been discovered affecting the advisability of the court's original adjudication or disposition." To the petition was annexed an affidavit, subscribed and sworn to by the petitioner, *concluding* that, among other things, her consent on September 23, 1969, "was obtained under duress and by coercion." The relief asked for was that the court declare the proceedings of September 23, 1969, null and void and return custody of Thomas Andrew Schroud to the petitioner. (App. 5, 6, 7, 9, 10 of Petition).

Sometime subsequent to the termination proceedings on September 23, 1969, the child was placed with and adopted by adoptive parents. (App. 7, 11, 19 of Petition).

On September 30, 1970, there was a hearing before the same Honorable George A. Bowman, Jr., on the petition for rehearing. At that hearing, the transcript of the original hearing on termination was available, and all parties indicated that they had perused the transcript. (App. 15 of Petition).

The trial court denied the petition for rehearing, after reviewing the law in Wisconsin, the transcript of the termination hearing, and after abiding the petitioner's attempt to demonstrate the existence of new evidence justifying a rehearing. (App. 12-20 of Petition).

An appeal was then taken from Judge Bowman's order denying the petition for rehearing to the Circuit Court of

Milwaukee County, Branch No. 15, the Honorable Marvin C. Holz, presiding. The court sustained the order of the lower court. (App. 6-12 of Petition).

On February 1, 1972, the Supreme Court of Wisconsin affirmed the judgment of the Circuit Court of Milwaukee County. (App. 1-6 of Petition).

ARGUMENT

The decision of the Wisconsin State Supreme Court does not violate the fundamental right of a litigant to a *hearing* as guaranteed under the Fourteenth Amendment of the United States Constitution.

I. There Was A Hearing On Voluntariness Of Consent.

At issue is not petitioner's constitutional right to be *heard* on the voluntariness of her consent, but rather her alleged constitutional right to be *reheard* on the voluntariness of her consent to termination of parental rights.

As noted in *Stanley v. Illinois* (1972), — U.S. —, 31 L.Ed. 2d 551, 92 S.Ct. —, due process within the purview of the Fourteenth Amendment to the United States Constitution does not require a hearing "in every conceivable case of governmental interference or private interest," citing *Cafeteria and Restaurant Workers Union Local v. McElroy* (1961), 367 U.S. 886-894, 6 L.Ed. 2d 1230, 81 S.Ct. 1743 and *Goldberg v. Kelly* (1970), 397 U.S. 254, 263, 25 L.Ed. 2d 287, 90 S.Ct. 1011.

Even conceding, *arguendo*, that fundamental due process as encompassed in the Fourteenth Amendment requires that a party to litigation be accorded an opportunity to be *heard*, it is clear that petitioner was accorded that opportunity at

the termination hearing on September 23, 1969. At that hearing it was established that the petitioner was no longer a minor under Wisconsin Law; that she was a college student; that she had discussed the termination with her parents and her caseworker, and that both agreed with her decision to terminate; that her decision to terminate was made after she requested, and received, an adjournment; that she stated her consent was free and voluntary, and the court, after instructive questioning, so found; that the caseworker believed petitioner's consent was free and voluntary and the court so found; and that the petitioner gave reasons for wanting to terminate and affirmatively stated she recognized the *finality* of her decision once made. (See STATEMENT OF THE CASE, *Supra*).

The record is clear, if anything is clear, that petitioner had an opportunity to be heard, and was heard, at the termination hearing where the trial court, through instructive questioning, made inquiry into the voluntariness of petitioner's consent and the reasons for it.

Accordingly, the cases cited by petitioner in support of her petitioner for Writ of Certiorari are not in point and are distinguishable. Indeed, *Stanley v. Illinois* (1972), — U.S. —, 31 L.Ed. 2d 551, 92 S.Ct. —, and *Rothstein v. Lutheran Social Services of Wisconsin* (1972), — U.S. —, 31 L.Ed. 2d 786, — S.Ct. —, and *Groppi v. Wisconsin* (1971), 400 U.S. 505, 27 L.Ed. 2d 571, 91 S.Ct. 490, all represented instances where there was no *initial hearing*. Those cases represented situations where the issue was the right to be *heard*, not the right to be *reheard*.

II. The Decision Below Does Not Conflict, In Principle, With Other Decisions On Rehearing.

On the question of petitioner's right to be reheard, that principle is settled.

A right to appeal is not essential to due process provided that due process has already been accorded in the tribunal of first instance. *State of Ohio ex rel. Bryant v. Akron Metropolitan Park District For Summit County* (1930), 281 U.S. 74, 74 L.Ed. 710, 50 S.Ct. 228, citing *McKane v. Durston* (1894), 153 U.S. 684, 687, 38 L.Ed. 867, 14 S.Ct. 913; *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company v. Backus* (1894), 154 U.S. 421, 427, 38 L.Ed. 1031, 14 S.Ct. 1114; *Reetz v. Michigan* (1903), 188 U.S. 505, 508, 47 L.Ed. 563, 23 S.Ct. 390; *Rogers v. Peck* (1905), 199 U.S. 425, 435, 50 L.Ed. 256, 26 S.Ct. 87, and *Standard Oil Company of Indiana v. Missouri* (1912), 224 U.S. 270, 286, 56 L.Ed. 760, 32 S.Ct. 406.

Again, it has been decided that appellate review of criminal convictions is not a right guaranteed by the Constitution of the United States. *Griffin v. Illinois* (1956), 351 U.S. 12, 20, 21, 100 L.Ed. 891, 76 S.Ct. 585.

While a rehearing on terminaton of parental rights is not identical to criminal appeal, arguably if a right to appeal in a criminal case is not required by federal constitutional law, no higher standard is required in the area of family law, the latter being peculiarily in the province of the individual states under their reserved powers.

III. The Decision Below Is Correct And Does Not Raise An Important Or Substantial Federal Question, And An Independent And Adequate State Ground Exists For It.

If federal constitutional law does not require a right to appeal, nor arguably a right to a rehearing, does Wisconsin Statutes sec. 48.46 necessarily compel it in the absence of a showing that new evidence exists affecting the advisability of the court's original adjudication or disposition?

Wisconsin Statutes sec. 48.46 clearly and unequivocally spells out the *sine qua non* of rehearings. The State of Wisconsin has a "countervailing state interest of overriding significance" (*infra*) requiring strict construction of Wisconsin Statutes sec. 48.46. Rehearing requirements under that section of the statutes are compatible, moreover, with rather stringent requirements in the Wisconsin criminal law before motions for new trial on grounds of newly discovered evidence are granted.

In *State v. Clark* (1967), 36 Wis. 2d 263, 153 N.W. 2d 61, the Wisconsin State Supreme Court enumerates the criteria governing granting a new trial on the basis of newly discovered evidence in criminal cases, which they state are the same as in a civil case. Citing *Lock v. State* (1966), 31 Wis. 2d 110, 117, 142 N.W. 2d 183, the requirements were enumerated:

1. The evidence must have come to the moving party's knowledge after a trial;

2. The moving party must not have been negligent in seeking to discover it;

3. The evidence must be material to the issue;

4. The testimony must not be merely cumulative to the testimony which was introduced to the trial; and

5. It must be reasonably probable that a different result would be reached on a new trial.

Accord, *Price v. State* (1967), 37 Wis. 2d 117, 154 N.W. 2d 222; *State v. Herfel* (1971), 49 Wis. 2d 513, 521, 522, 182 N.W. 2d 232, 237; *State v. Chabonian* (1971), 50 Wis. 2d 574, 185 N.W. 2d 289; *Simos v. State* (1972), 53 Wis. 2d 493, 192 N.W. 2d 877; *State v. Bailey* (1972), 54 Wis. 2d 679, 196 N.W. 2d 664.

Wisconsin Statutes sec. 48.46, in appropriate part, and the Wisconsin criminal cases just cited are compatible and evince a uniform state policy with reference to the granting of new trials on the grounds of newly discovered evidence which probably affect the original disposition or adjudication.

Based on this authority, and in the absence of a satisfactory showing of newly discovered evidence, after an opportunity was given to make such a showing at the hearing on the petition for rehearing, it is clear that the decision below is correct. There was not an automatic right to a rehearing, particularly after petitioner was once heard on the same issues at the termination hearing, and in the absence of a satisfactory showing that new evidence existed affecting the original adjudication or disposition entered at the original termination hearing.

Moreover, the petition for Writ of Certiorari should be denied because no important or substantial federal question is involved. Indeed, whether there was a satisfactory raising of a federal question in the state courts is put in doubt by *Beck v. Washington* (1962), 369 U.S. 541, 8 L.Ed. 2d 98, 82 S.Ct. 955. The petitioner does not appear to have argued the constitutional contention in her brief, as opposed to merely

setting it forth in her brief, and the Wisconsin Supreme Court seems, in any event, to have avoided the federal issue assuming, arguendo, that it was properly raised by petitioner by a brief, or otherwise, in the Wisconsin Supreme Court.

Submitted, the Wisconsin State Supreme Court decision is predicated on an independent and adequate state ground, in turn based on a "countervailing state interest of overriding significance." *Boddie v. Connecticut* (1971), 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780.

The Wisconsin State Legislature in the Children's Code, Chapter 48 of the Wisconsin Statutes, makes it clear that it is a compelling state interest of overriding significance that children who have been placed in adoptive homes and have been adopted are not to be interfered with by their natural parents once they are legally established in those homes. Wisconsin Statutes sec. 48.01 (1) and (2) (f) and 48.01(3) read as follows:

> 48.01 Title, Intent and Construction of Chapter. (1) Title. This chapter may be cited as "the Children's Code."
> (2) Intent. It is declared to be the intent of this chapter to promote the best interests of the children of this state through:
> (f) Assurance for children needing adoptive homes that they will be placed in the best home available; protection of children from adoption by persons unfit to have responsibility for raising a child; protection for children who are legally established in adoptive homes from interference by their natural parents.
> (3) Construction. This chapter shall be liberally construed to effect the objectives in sub. (2). The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child and the interest of the public.

The strong public policy against belated interference with lawful orders of adoption is clearly seen in Wisconsin Statutes sec. 48.86, Withdrawal of Consent:

> Withdrawal of any consent filed in connection with a petition for adoption hereunder shall not be permitted, except that the court, after notice and opportunity to be heard is given to the petitioner in the adoption proceedings, to the person seeking to withdraw consent and to any agency participating in the adoption proceedings, may, if it finds that the best interests of the child will be furthered thereby, issue a written order permitting the withdrawal of such consent. The entry of an order of adoption renders any consent irrevocable.

The people of Wisconsin, through its legislature, have manifested a compelling and transcendent state interest with respect to state rules of procedure to the end that orders of adoption, and placement of children with adoptive parents, are not interfered with by natural parents. To that end, the Children's Code clearly provides for termination of parental rights procedure. In this instance, that procedure was scrupulously followed by the trial court at the termination hearing. And in Wisconsin Statutes sec. 48.46, the Wisconsin Legislature has clearly provided for a rehearing procedure which requires a showing that new evidence has been discovered affecting the advisability of the court's original adjudication or disposition. An opportunity to make such a showing was given petitioner, but three Wisconsin courts have held that a satisfactory showing was not made.

Were those rulings based on an independent and adequate state ground?

Clearly, the best interest of an adopted child, as best interest is to be liberally construed under the Children's

Code, is that they be free "from interference by their natural parents." Wisconsin Statutes sec. 48.01 (2) (f).

To be free from that interference after there has been an order of termination and an order of adoption, the State of Wisconsin is free to require a *strong* showing that new evidence exists warranting a rehearing and a potential interference with the placement of an adopted child.

The Wisconsin Supreme Court, and the intermediate appellate court found that the unverified petition of counsel and the affidavit of the natural mother were not a sufficient *evidentiary* showing that newly discovered evidence existed which would affect "the advisability of the court's original adjudication or disposition." That decision is almost inescapable, based on the transcript of the proceedings, if Wisconsin Statutes secs. 48.01, 48.46 and 48.86 are to be reconciled.

The public policy argument supporting the decision below is spelled out in Justice Robert W. Hansen's concurring opinion in *State ex rel. Lewis v. Lutheran Social Services* (1970), 47 Wis. 2d 420, 437, 178 N.W. 2d 56, which, in pertinent part, reflects upon the state interest in *finality:*

> There is sound public policy involved in the statutory insistence that appeals from orders affecting the future life and well-being of children be made within a forty-day period. The majority opinion states well the tragic consequences of time-consuming delays in the proper, prompt and permanent placement of illegitimate children in stable home surroundings with adoptive parents. It is bad enough that the disposition of criminal prosecutions is delayed for months and years. It is sad enough that crowded court calendars delay trials of personal injury actions for even longer. At least the legislature has sought to avoid similar delays in the appeals of orders

> entered under the authority of the Children's Code. There is no good reason why a petitioner who has elected not to appeal a county court order denying his claim of rights as a "putative father" should be permitted to evade the forty-day limit on children's court appeals by much later seeking a writ that is a clear attempt to review and reverse the county court order which can no longer be appealed. So I would deny the writ. In fact, I would not have entertained it in the first place.

In *Labine v. Vincent* (1971), 401 U.S. 532, 538-40, 28 L.Ed. 2d 288, 294, 91 S.Ct. 1017, Mr. Justice Black, for the majority, opines:

> But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws. We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State. . . . In short, we conclude that in the circumstances presented in this case, there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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